ABSTRACTS OF RECENT AMERICAN DECISIONS.

SUPREME COURT OF THE UNITED STATES.[1]

COURT OF ERRORS AND APPEALS OF MARYLAND.[2]

SUPREME COURT OF MICHIGAN.[3]

SUPREME COURT OF NEW JERSEY.[4]

SUPREME COURT OF PENNSYLVANIA.[5]

SUPREME COURT OF WISCONSIN.[6]

ADMIRALTY.

Collision—Practice.—The doctrine, over and over again ruled by this court, that when in admiralty cases involving questions of fact alone, the District and Circuit Courts have both found in one way, every presumption is in favor of the decrees, and that there will be no reversal here unless for manifest error, again declared: *The S. B. Wheeler*, 20 Wall.

Whether the absence of a lookout at the bow of a sailing-vessel, though at night, was or was not a contributing fault to a collision, is a question of fact, and where on a libel for a collision both the District and the Circuit Courts have held that it was not, the general rule of practice just above stated, as to the effect of decisions by the two courts in one way, applies: *Id.*

ASSUMPSIT.

Waiver of Fraud and Action for Money had, &c.—Where one fraudulently exhibiting to another a sealed instrument reciting that the person exhibiting it has a claim for a sum of money on a third party (he having no claim whatsoever), fraudulently induces that other to buy it from him, and such other buying it, pays him in money for it, and takes an assignment under seal on the back of the instrument, the person thus defrauded may recover his money in *assumpsit*, on a declaration containing special counts setting out the instrument as inducement, and averring the utter falsity of its recitations, and the fraud of the whole transaction; the declaration containing also the common counts: *Burton* v. *Driggs*, 20 Wall.

ATTACHMENT.

Defence by Garnishee—Exemption of Debtors' Property from Execution—Notice to Debtor—Laws of other States—Presumption as to—Corporation.—A garnishee who knows that the property of the attachment debtor in his possession, or the money which he owes such debtor, is by

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[1] From J. W. Wallace, Esq., Reporter; to appear in vol. 20 of his Reports.

[2] From J. Shaaf Stockett, Esq., Reporter; to appear in 40 Md. Reports.

[3] From Hoyt Post, Esq., Reporter; to appear in 30 or 31 Mich. Reports.

[4] From G. D. W. Vroom, Esq, Reporter; to appear in vol. 8 of his Reports.

[5] From P. F. Smith, Esq., Reporter; to appear in 75 Pa. State Reports.

[6] From Hon. O. M. Conover, Reporter; to appear in 35 or 36 Wis. Reports.

law exempt from attachment and execution, must bring that fact to the notice of the court: otherwise the judgment against such garnishee, and satisfaction thereof, will not bar an action against him by the attachment debtor. So *held* in a case where the principal debtor was not personally served with process in the attachment suit, and had no notice either of that suit or of the proceeding in garnishment: *Pierce* v. *The C. & N. W. Railway Company*, 35 or 36 Wis.

Under the laws of Wisconsin, "the earnings of all married persons or persons who have to provide for the entire support of a family," in this state for the sixty days next preceding the issue of any process against them, are exempt from levy, seizure or sale upon such process, and cannot be garnished on attachment. And *it seems* that where that question arises in any case, it must be presumed, in the absence of proof, that the laws of Illinois are similar to our own in that respect: *Id.*

Where a corporation existing under the laws both of Wisconsin and of another state, has been garnisheed in the latter state, in an attachment suit against a resident of Wisconsin, and has suffered and satisfied a judgment against it as garnishee, and is afterwards sued in Wisconsin by the attachment defendant, for the same property or indebtedness for which it was thus garnisheed, it must be treated in such action as a *domestic corporation*, and presumed to know the exemption laws of Wisconsin: *Id.*

In such case the proceedings in attachment being *ex parte*, without service of process on the attachment debtor or notice to him of the action, it is the duty of the garnishee corporation, in order to protect itself, to notify the debtor of the pendency of the proceedings in garnishment, and request him to defend: *Id.*

Whether the rules above stated would be different with respect to a merely *foreign* corporation, is not here decided: *Id.*

Broker.

Carrying Stock—Not bound to keep on Hand the identical Shares.—Where a broker agrees to carry for and on account of a customer, for the period of twelve months, a certain number of shares of railroad stock, at a specified price per share, he is not bound to retain in his possession during the pendency of the carrying contract, the identical stock which he agreed to carry; he may sell the whole or any part thereof; all that the law requires of him is, that during the pendency of the contract he should have on hand, in his possession, or under his control, an equal number of other shares of the same stock, ready for delivery when his customer should pay what he owed on account thereof, or to be sold on his account when he should so direct: *Price* v. *Gover*, 40 Md.

Building Association.

Rule for ascertaining the true Amount due under Mortgages held by a Building Association.—Where a Building Association is prematurely dissolved, and the mortgages held by it against the members whose shares of stock had been redeemed by loans or advances, are foreclosed, in determining the true amount due under such mortgages, the mortgagors should be allowed, not only for the sums paid by them as weekly dues, but also for what they paid as interest; while they are to be charged interest at the rate of six per cent. per annum on the sums advanced by

the Association, and so from time to time on the balance of such sums, after deducting therefrom the moneys paid by them for weekly dues and interest. On the payment of the balance due upon their mortgages, thus ascertained, they will be entitled to have the same released: *Windsor* v. *Bandel*, 40 Md.

CATTLE. See *Distress.*

CERTIORARI. See *Practice.*

COMPROMISE. See *Fraud.*

CONSTITUTIONAL LAW. See *National Bank; Navigable Waters.*

Municipal Corporation—Power to make Ordinances and prescribe Fines and Imprisonment for Violation—Criminal Law—Regulation of Selling Liquor is within Police Power—Offence against two Authorities by the same Act.—The 18th section of the charter of the city of Plainfield, giving to the Common Council the power to prescribe, by ordinance, fines and penalties for the violation of any of its ordinances, with the proviso that the amount of fine shall in no case exceed one hundred dollars, or the term of imprisonment twenty days, preserving the right of trial by jury if demanded by the defendant in all cases, where the punishment prescribed may be imprisonment or the amount of fine exceed twenty dollars, is not unconstitutional: *William Hone* v. *The Treasurer of Plainfield*, 8 Vroom.

The provision of the state Constitution which ordains that the right of trial by jury shall remain inviolate, is substantially the same as that upon the same subject contained in the Constitution of 1776, and neither was intended to extend the right of trial by jury to cases where it did not previously attach: *Id.*

The case of *McGear* v. *Woodruff*, 4 Vroom 213, approved: *Id.*

The same act may constitute an offence both against the state and municipal corporation, and both may punish without violation of any constitutional principle: *Id.*

The unlawful retailing of intoxicating drinks or the keeping of tippling-houses, are not included in the category of criminal offences, the punishment of which cannot, constitutionally, be delegated by the legislature to a municipality, as offences cognisable by it under the powers of police: *Id.*

CONTRACT. See *Deed; Fraud; Partnership.*

Settlement—Estoppel—Negligence.—This was an action to recover money earned under a contract for running logs. The contract provided that Milliken should run the logs for himself and three other firms, of which plaintiffs in error were one. Milliken was to receive a *per diem* allowance, and the expenses of driving the logs were to be equalized, each owner to furnish his share of men and outfit, and at the close of the work there was to be a final settlement. Each owner was bound to furnish his wood scale, specifying the number of his logs, and the proportion of men and provisions, &c., was to be estimated from this, and each was to pay his own men. An account of time was to be kept by Milliken, and in the settlement each who had furnished a surplus was to be credited, and each one short was to be charged his deficiency. *Held*, That while the contract was for some purposes mutual, it was in the main one whereby each owner became severally responsible for any liability to respond: *Stewart et al.* v. *Milliken*, 30 or 31 Mich.

A settlement was made, at which Stewart, one of the plaintiffs in error, was present, but Smith, the other, was not. It was postponed for a while, as Stewart said Smith knew most about the facts, but Smith refused to attend. A statement was furnished to plaintiffs in error, and no subsequent objection was made until after suit was brought. *Held*, That the contract contemplated a settlement immediately on the close of the business, and this settlement was necessary to ascertain the exact liability of all the parties, and that as the expenses were to be ratably divided, it was essential it should be made once for all, since it could not afterwards be disturbed without affecting every party to the contract; that it was made the duty of each to be prepared in season with a statement of what he had furnished, and to use diligence in enabling an adjustment to be made; that the only course was for the parties to make such settlement as they could, and that unless specified objections were made within a reasonable time, it would be unjust to permit such settlement to be attacked after every one had been compelled to act upon it or leave the accounts without any settlement: *Id.*.

The jury were directed that, unless impeached for fraud or mistake, a settlement so made and furnished must stand, if not objected to within reasonable time. *Held*, That this ruling was not open to objection by plaintiffs in error, and that it was quite favorable enough; that they should be held estopped by a much less degree of negligence than would have been pardonable if there were no third parties involved in the settlement, with whom Milliken had to close his accounts: *Id.*

New Terms—Consideration—Corporation—Authority of Officers—An agreement to engraft new terms upon an existing contract, is not binding if without consideration: *Titus and Scudder* v. *The Cairo and Fulton R. R. Co.*, 8 Vroom.

The authority of G. to sell bonds of the company will not be inferred from his position as director of the company, nor from the fact that the president of the company gave him a power of attorney to sell. The authority of the president to execute such power of attorney must be shown: *Id.*

CORPORATION. See *Attachment; Contract.*

COVENANT. See *Deed.*

CRIMINAL CONVERSATION.

Marriage—Evidence—Damages.—In an action for criminal conversation an actual marriage must be proved: *Hutchins* v. *Kimmel*, 30 or 31 Mich.

Proof of a ceremony of marriage in a foreign state, followed by cohabitation as man and wife, will be presumed a valid marriage by the law of the foreign state: *Id.*

Conduct of plaintiff on learning of his wife's offence is admissible in evidence on the subject of damages: *Id.*

CRIMINAL LAW. See *Constitutional Law.*

DEBTOR AND CREDITOR.

Fraudulent Sale.—Where the question was, whether a sale of chattels was fraudulent as against a creditor, there was no error in refusing to instruct the jury, that "the conveyance of the whole property of a

debtor affords a very violent presumption of a fraudulent intent so far as existing creditors are concerned: *Bigelow* v. *Doolittle, Sheriff*, 35 or 36 Wis.

The fact that a debtor has conveyed all his property to another person is a circumstance to be considered by the jury in connection with all the other facts of the case, in determining whether the sale was fraudulent; and it is *for the jury* to determine, in view of all those facts, whether such conveyance is a *violent* or only a *slight* indication of fraud: *Id.*

DEED.

Covenant—Condition—Specific Performance.—Complainant deeded to the Ionia & Lansing Railroad Company in June 1870, certain ground on his farm for a track and depot, in consideration of $500 and the covenant to build a depot set forth in the deed. Following the description of property in this deed was this clause: "But this conveyance is made upon the express consideration that said railroad company shall build, erect and maintain a depot or station-house on the land herein described, suitable for the convenience of the public, and that at least one train each way shall stop at such depot or station each day when trains run on said road, and that freight and passengers shall be regularly taken at such depot." The deed was otherwise in usual form. The bill is for the specific performance of this clause, or for compensation in damages. The defendant claims that this clause constitutes not a covenant, but a condition subsequent, and that the complainant is not entitled to the relief prayed. *Held*, 1. That the rule for holding in doubtful cases that a clause is a covenant and not a condition, where the grantor maintains that it is a condition, which is based on the idea that a condition as tending to destroy the estate would be less favorable to the grantee, does not apply here, where the grantee insists that it is a condition; that the position of these parties confounds the reason of such rule and would dispense with the rule itself if the case were a doubtful one: *Blanchard* v. *Detroit, &c., Railroad Co.*, 30 or 31 Mich.

Held, 2. That the fact that one of the parties is a natural and the other an artificial person, gives no significance whatever to the legal merits, nor does it in any manner bear upon the proper exposition and application of the controlling principles: *Id.*

Held, 3. That in construing this clause it must be given effect according to the legal interpretation and meaning of its terms, and not according to any erroneous impression either party may have formed respecting its operation; and that the fact that this clause is referred to in the consideration clause and called a covenant will not control the proper meaning and nature of the terms actually used in the clause in question, at least not where that meaning is clear and unambiguous on its face: *Id.*

Held, 4. That the clause in question is clear and unambiguous, and is a condition subsequent and not a covenant; and that where there is no imposition, fraud or mistake, the party who deliberately makes a condition, and nothing but a condition, cannot change its character by asserting that he meant it should be a covenant: *Id.*

Held, 5. That the requirements of the writing in question are not of such a nature, or so fully and clearly marked out, defined, identified or indicated as to make specific execution by the court practicable; that the court has no power to execute the requirements, which are leading

objects of the provision, for stopping trains and receiving and discharging freight and passengers, and has no machinery by which it could superintend and supervise the business of running trains on defendant's road and cause the requirements to be carried out; and that the want of details and the lack of particularity and specification would alone preclude specific performance; and some of the particulars in which the writing is wanting in this respect are specified and pointed out in the opinion: *Id.*

Held, 6. That the alternative relief prayed for by way of allowance of damages in the nature of compensation is inadmissible; that the uncertainties and lack of details which mark the case would be an obstacle to the granting of this relief; and that a full and complete award for refusing to perform a series of daily acts to extend through all the future would be impossible upon any *data* afforded by the case; and that a partial award, for present damages, would be not only futile, but would be an unwarrantable departure from principle: *Id.*

Distress.

Cattle doing Damage on the Highway.—Cattle doing damage *on the highway* were not distrainable at the common law, or at least were not distrainable after the passage of the statute of Marlborough, A. D. 1267: *Taylor* v. *Welbey*, 35 or 36 Wis.

The statute of this state on the subject is a complete revision of the whole law of distress *damage feasant*, and takes the place of all former laws on that subject: *Id.*

The statute limits the right to the distraining of beasts doing damage *within the enclosure of the distrainor* (Tay. Stats. 793, § 1); and the word "enclosure" there means a tract of land surrounded by an actual fence, together with such fence, and does not include that part of a public highway of which the fee belongs to the owner of such adjoining enclosure: *Id.*

A by-law of a town prohibiting cattle from running at large, and inflicting a pecuniary penalty upon the owner of cattle violating the law, confers no right upon the owner in fee of land included in a highway in such town, to distrain cattle grazing upon such highway: *Id.*

Plaintiff having, without legal authority, distrained defendant's cattle as *damage feasant*, defendant had a right peaceably to reclaim them; and even if he reclaimed them forcibly, plaintiff could not maintain *replevin* against him for the cattle: *Id.*

Equity. See *Deed; Surety; Trust.*

Estoppel. See *Contract.*

Evidence.

Power of Courts to order Inspection of Papers.—At common law and independently of recent statutes, courts of law had the power to order inspection of papers, which, by the pleadings or by being used in the evidence, came within the control of the court. But the court in exercising this control over papers, will merely grant inspection and examination by the party and his witnesses, either in open court or before an officer of the court, or in the presence of the party producing them or his attorney, and will not take them from the latter and deliver them

into the possession of the other side: *Hillyard* v. *Township of Harrison*, 8 Vroom.

Quere: Who is entitled to the custody of the duplicate of assessment of taxes, and the tax warrant issued for unpaid taxes, after the collector of taxes is out of office: *Id.*

Name as Evidence of Identity of Persons.—Plaintiff's name was John Gottlieb Kimmel, his wife was known as Philopena Kimmel, and there was evidence that her maiden name was Utz. In an action for criminal conversation in which it was necessary to prove actual marriage, a certificate of marriage in Wurtemberg between John Gottlieb Kimmel and Sabrina Philopena Utz was held to be evidence of the marriage, without other identification of the persons: *Hutchins* v. *Kimmel*, 30 or 31 Mich.

FEDERAL COURTS. See *Limitations.*

FISHERY. See *Navigable Waters.*

FOREIGN CORPORATION. See *Limitations.*

FOREIGN LAW. See *Attachment; Husband and Wife.*

FRAUD. See *Assumpsit; Debtor and Creditor.*

Representations—Reliance Upon—Compromise—Rescission of Contract.—T. and W., being partners in the drug business, entered into an agreement for the dissolution of the partnership, by which W. was to take all the assets, with certain exceptions, pay all debts of the firm appearing on its books, and a few others mentioned, with the taxes then assessed on the property, and pay plaintiff $8000, viz., $5000 down, and the remainder, with interest, in sixty days; and T. covenanted not to carry on the same business within certain limits, during a term of five years. There were also some other covenants, and mutual releases. In this action by T. to recover the unpaid balance of $3000 and interest, W. set up both as a defence and as a ground of counterclaim, false and fraudulent representations made to him by T. during the pendency of the negotiations, as to the value of the stock in trade and bank credits of the firm, the debts due it, and the debts which it owed, and as to the correctness of the books of account of the firm, kept by T. *Held*, That such defence or counterclaim could not be maintained without showing that W. *relied upon* said representations of T., and executed the agreement *on the faith thereof*: *Van Trott* v. *Weisse*, 35 or 36 Wis.

The agreement aforesaid was entered into on the 2d of July 1873. On the 19th of May previous W. had commenced an action against T. for the dissolution of the partnership and a settlement of its affairs, praying for an injunction, receiver, and accounting. The verified complaint in such action alleged that the stock of goods was then worth, as near as W. could ascertain, between $12,000 and $14,000, and that the debts due the firm amounted to at least $3000; and it charged T. with embezzlement of large sums of money of the firm, and with making fraudulent entries and omissions in the account books of the firm, so as to conceal such embezzlement and make the value of the stock in trade appear largely in excess of its real value, &c. T. answered said complaint, denying the alleged frauds; and pending that action, the parties

negotiated for a settlement of their partnership affairs, which resulted in the aforesaid agreement of July 2d; and said action of W. was discontinued (pursuant to such agreement), without costs to either party. Upon these facts appearing in the present action, *held*, that it sufficiently appears that plaintiff could not have relied on fraudulent representations, which were in direct conflict with his sworn complaint then on file. He had no right to be misled by them, and cannot be heard to aver that he was so misled: *Id.*

As all the fraudulent representations now alleged relate to the same subjects, and are of the same character as those alleged in the action of May 19th, and were the subject of compromise in the agreement of July 2d, here sued on, and no *new* element of fraud has intervened, the controversy concerning them was for ever closed by such agreement. *Id.*

A party who seeks to rescind an entire contract for fraud of the other party thereto, must return, or offer to return, whatever he has received under it. He must rescind *in toto*, if at all: *Id.*

In an action for the price of goods sold, defendant may plead as a defence or counterclaim, that he purchased the goods on the faith of fraudulent representations made by the vendor, as to the quality, condition, &c., of the goods. But this was not such a case: *Id.*

The consideration of defendant's covenant (here sued on) was, not only the sale to him of plaintiff's interest in nearly all the assets of the firm, but also the other stipulations and covenants of plaintiff in the written agreement aforesaid. Defendant, on several occasions, requested plaintiff "to take back the store at $8000," *i. e.* to repay defendant the $5000 paid down, and cancel the covenant to pay the $3000; but he *did not* offer to cancel the said written agreement. *Held*, That for this reason, also, the defendant cannot maintain his defence or counterclaim: *Id.*

Frauds, Statute of.

Parol Contract for the Sale of a growing Peach Crop.—By parol contract, the plaintiff agreed to sell to the defendant, and the defendant agreed to purchase from the plaintiff, the peaches then growing in the peach orchard of the plaintiff, at and for a specified sum, the defendant to gather and remove the peaches as they matured. The defendant or his agent at the time of the purchase, paid the plaintiff a portion of the purchase money, and a further portion before any peaches were gathered, and gathered said peaches from the orchard as they matured, and removed the same. In an action brought for the balance of the purchase-money, it was *Held:* 1st. That the plaintiff was entitled to recover. 2d. That the contract was not invalid under the operation of the 4th section of the Statute of Frauds: *Purner* v. *Piercy*, 40 Md.

A sale of any growing produce of the earth, in actual existence at the time of the contract, whether it be in a state of maturity or not, is not to be considered a sale of an interest in or concerning land: *Id.*

Delivery of Goods.—If the purchaser of goods under an agreement otherwise void by the Statute of Frauds, accepts a delivery of the goods or some part of them, either when the agreement is made or afterwards, such agreement thereby becomes a valid contract: *Anson* v. *Dreher*, 35 or 36 Wis.

In an action for the price of three casks of wine alleged to have been shipped by plaintiffs in New York to defendant in Milwaukee, on his

order (such price being over fifty dollars), there was conflicting evidence as to whether defendant ordered more than one cask, and also as to whether he did not subsequently accept a delivery of the three casks at place where they had been stored in Milwaukee. *Held*, That if there was such an acceptance, neither the Statute of Frauds nor the alleged excess of plaintiffs in filling the order was of any importance; and the court properly refused a nonsuit, and submitted the question of acceptance to the jury: *Id.*

GROWING CROPS. See *Frauds, Statute of.*

HIGHWAY. See *Distress.*

HUSBAND AND WIFE. See *Trust.*

Marriage—Presumption as to Law of Foreign State.—A marriage valid where it is celebrated as a general rule is valid everywhere, and one void where celebrated void everywhere: *Hutchins* v. *Kimmel*, 30 or 31 Mich.

If a marriage takes place in this state, evidence that a ceremony was performed ostensibly in celebration of it, with the apparent assent and co-operation of the parties, is evidence of a marriage, even though it falls short of showing that the statutory regulations were complied with, or affirmatively shows that they were not: *Id.*

A formal ceremony of marriage, whether in due form or not, must be assumed to be by consent and therefore *primâ facie* a contract of marriage *per verba de presenti;* and marriage between parties capable of contracting it, being of common right and valid by a common law prevailing throughout Christendom, and regulations restrictive of this right and imposing conditions upon it being exceptional, the burden of proving that what is a sufficient common-law marriage is not a valid marriage where celebrated, in a case where the local law is not shown, is on the party claiming that the case falls within such exceptional regulations, and it will not be presumed where a marriage *primâ facie* good is shown, that there are regulations restrictive of the common right, until they are shown: *Id.*

The presumption that the common law as it exists here prevails in a foreign country, in the absence of proof to the contrary, is applicable to all marriages celebrated in Christian countries, and especially in a case where the parties, after taking such steps abroad to constitute a marriage as would be sufficient under our laws, remove afterwards to this country, and in apparent reliance upon the marriage and the protection our laws would give it, continue for many years to live together as husband and wife: *Id.*

INTOXICATING LIQUORS. See *Constitutional Law.*

LANDLORD AND TENANT. See *Surety.*

LIMITATIONS, STATUTE OF.

Foreign Corporation cannot take Advantage of in New York—Federal and State Courts.—The highest courts of New York, construing the statutes of limitation of that state, have decided that a foreign corporation cannot avail itself of them; and this, notwithstanding such corporation was the lessee of a railroad in New York, and had property within the state, and a managing agent residing and keeping an office of the company: *Tioga R. R.* v. *B. & C. R. R.*, 20 Wall

These decisions upon the construction of the statutes are binding upon this court, whatever it may think of their soundness on general principles: *Id.*

MARRIAGE. See *Husband and Wife.*

MUNICIPAL CORPORATION. See *Constitutional Law.*

Assessments for Improvements—Interest.—Where bonds have been sold by a city to raise money in anticipation of a street improvement, and the proceeds in the mean time have been used by the city for other purposes, it is not lawful to include interest during that time, in the estimate of the expense of the improvement to be assessed on the landowners: *State, Henry M. Baker, et al., pros.*, v. *The City of Elizabeth*, 8 Vroom.

If bonds have been sold by legislative authority at less than par, the discount can be included in the estimate: *Id.*

Street Improvements—Assessments.—A provision in the Jersey City charter of 1871, section 48, that each lot shall be assessed for the labor and materials necessary to grade the street in front of it, and for its share of the intersections, and to be credited for the materials taken in front of it, and proportionally from any neighboring intersection, is in total disregard of the well established doctrine that the assessment shall not exceed the benefits, and an assessment made thereunder must be set aside: *State, Van Tassel, et al., pros.*, v. *The Mayor and Aldermen of Jersey City*, 8 Vroom.

A supplement (Laws, 1873, p. 405, sec. 21) providing that in making any assessment for improvements under section 48 of the original act, the expenses of excavating rock and all other excavation shall be assessed upon "all the property benefited by such excavation, and to be assessed for said improvement;" also, fails to recognise the principle of benefits entirely, for it still limits the property to be assessed to that which was to be assessed by the charter. It was not intended by that clause to enlarge the limits of the property to be assessed, but only within the same limits to have the expense assessed according to benefits, and thus making all the property on the frontage liable to pay the whole cost of the excavations. An assessment under that provision is illegal: *Id.*

There is no valid objection against assessing the cost of flagging sidewalks on the principle of frontage, but under such a power the estimate must not include any part of the expense of substantial grading (excavation and filling) of that part of the street occupied by the sidewalks. Incidental grading for the mere purpose of flagging may be included, but not the substantial grading of any part of the street, although included in the sidewalks: *Id.*

Liability for Acts of its Officers—Negligence.—A servant was driving his master's horse on a street of a city faster than was permitted by the ordinance; he and the horse were taken into custody by the police, by negligence the horse escaped and was killed. *Held*, That the city was not responsible for the negligence of the police: *Elliott* v. *City of Philadelphia*, 75 Pa.

In order to charge a municipal corporation for negligence in the performance of a public work, the law must have imposed a duty on it so as to make the neglect culpable: *Id.*

The officers of a city are *quasi* civil officers of the government, although appointed by the corporation: *Id.*

Where a city only authorizes a lawful act to be done in a lawful manner, it is not responsible for acts of its officers outside of the authority: *Id.*

Assessments for Improvements of Streets.—An assessment made under charter of village of Passaic, which provides that the whole cost of the improvement shall be assessed upon lands fronting on the improvement, in proportion to the benefit received by each lot, is illegal, as it requires such lots to bear the whole burthen of the cost without limitation to actual benefits, and the mode of its distribution merely, being according to benefits: *State, The Delaware, Lackawana & Western R. R. Co., pros.* v. *The Village of Passaic*, 8 Vroom.

Since the case of *Agens* v. *The City of Newark*, in Court of Errors, an assessment for an improvement of this character (grading) cannot be sustained where made according to a statute fixing a standard otherwise than actual benefits, and limited only by political territorial divisions, if the legislature choose to make any such limitation: *Id.*

Section 48 of the charter of the city of Passaic, (Acts of 1873,) is only intended to validate proceedings not done in conformity to the Act of 1869, the same as if it had been complied with, and to impose upon the land-owners the *onus* of showing that the assessment, as to benefits, had not been made according to that act, and not that it exceeds the actual benefits: *Id.*

NAME. See *Evidence.*

NATIONAL BANK.

Attachment on Warrant issued by a State Court, illegal—Validity of sec. 2 of the Act of Congress of March 3d 1873.—An attachment *on warrant* issued by a state court to affect the funds of a national bank is illegal and void, being in violation of section 57 of the Act of Congress, ch. 106, approved June 3d 1864, as amended by section 2 of the Act of Congress, ch. 269, approved March 3d 1873: *Chesapeake Bank* v. *First National Bank of Baltimore, Garnishee,* 40 Md.

The second section of the Act of Congress, ch. 269, approved March 3d 1873, amending section 57 of the Act of Congress, ch. 106, approved June 3d 1864, is constitutional and valid, being a provision to promote the efficiency of the national banks in performing the functions by which they were designed to serve the government, and to protect them not only against interfering state legislation, but also against suits or proceedings in state courts, by which their efficiency would be impaired: *Id.*

NAVIGABLE WATERS.

Rights of Fishery—Grant of Right to Citizens—Trespass.—Fishing for oysters in the navigable waters of this state is a right common to all its citizens, which may be exercised by them at will, except so far as it is restrained by positive law: *Paul et al.* v. *Hazleton*, 8 Vroom.

The legislature may grant the right to plant oysters in the bed of the navigable streams to one citizen, to the exclusion of others: *Id.*

Section 1 of the Supplement to the Oyster Law, approved March 9th

1855 (Nix. Dig. 134, pl. 26) gives such exclusive right to the adjacent land-owner when he stakes it off in good faith for planting. But it is a mere license to the land-owner, subject to revocation: *Id.*

The action of trespass will be for an invasion of this right: *Id.*

Trespass by Vessel—Right of Fishery.—A vessel ran into a net laid in a private fishery in a navigable stream and damaged it. *Held*, That the captain was liable, if upon being warned he could have changed his course without prejudice to the reasonable prosecution of his voyage: *Cobb* v. *Bennett*, 75 Pa.

What would be a reasonable prosecution of a voyage depended upon the attendant circumstances: *Id.*

A vessel may hold her course in a navigable stream without regard to a fisherman's net, if the master act without wantonness or malice and do no unnecessary damage: *Id.*

Fishery is an acknowledged right, but is subordinate to the rights of navigation: *Id.*

Wantonness is reckless sport, wilfully unrestrained action, running immoderately into excess: *Id.*

NEGLIGENCE. See *Contract; Municipal Corporation.*

Hired Horses—Innkeepers—Evidence—Statements of Agent—Liability for Overdriving a Hired Horse.—Fay recovered judgment for the value of a horse hired by Ruggles for a journey from Manistee to Pentwater and not returned. The horse died the next day after reaching Pentwater, and the loss was claimed to have occurred from neglect in proper treatment, or from overdriving, or from both. Evidence was received against objection that on the morning after the arrival at Pentwater the driver said "that he supposed the horse had been driven too hard from Manistee the day before, but that he had driven according to instructions." *Held*, That this was inadmissible, as being a statement by a third person and not the defendant, and a narrative of a past transaction; that it was no part of the *res gestæ* because the person making it was not in the performance of any duty which called for it, and that it was hearsay and improper: *Ruggles* v. *Fay*, 30 or 31 Mich.

The court refused to charge that when the team was intrusted to the innkeeper—the driver putting up at the inn—the innkeeper became responsible for careful keeping, and that if the horse died through his neglect defendant would not be liable, and charged that he would be liable if the horse died from negligent treatment at Pentwater. *Held*, That it is very generally to be expected that horses may safely be intrusted to the care of innkeepers and owners of innstables but that whether it would be prudent to do so in a given case must depend upon circumstances; that the driver as representing defendant was bound to use such prudence and oversight as would be usual under the circumstances, and no more, and that the only safe rule is to leave it to the jury to determine on the whole facts whether or not there was any failure on the part of defendant, or his servant, to do what he should be expected to do as a man of common prudence: *Id.*

The court also refused to charge that if the jury should find the horse was driven in the time and by the way and by the driver agreed upon, and was overdriven because his master agreed that he should perform a greater service than he was equal to perform, the plaintiff could not

recover. There was evidence from which it is claimed it might be found that the plaintiff was informed that defendant must reach Pentwater by a given time to take the cars. *Held*, That the owner of a team cannot complain of parties who do no more than was agreed upon, and that if the evidence would warrant a finding of such an arrangement the charge should have been given: *Id.*

Partnership.

Construction of Contract.—H. and S. entered into business October 1st 1871, to continue until April 1st 1875, unless, at the expiration of eighteen months from the former date, the business did not pay its own expenses, in which event S. was to have the right to close it after that time. The entire working capital, $5000, was furnished by S. It appearing that on the 8th of August 1872, this working capital was lost. *Held*, That S. was not obliged to furnish more capital or to pledge his credit in the prosecution of the business, and that he might therefore terminate the agreement August 8th 1872, subject to his liability to pay H. wages to April 1st 1873: *Hill* v. *Smalley*, 8 Vroom.

Practice.

Appearance— Waiver of Technical Objections—Certiorari.—The object of a warrant is to bring the party defendant into court, and if legally insufficient for that purpose, objection should be made to it before the defendant submits himself to the jurisdiction of the court, and goes to trial on the merits of the case: *Clifford* v. *The Overseer of the Poor*, 8 Vroom.

The general appearance of the defendant is a waiver of all objections to the form of the process and the manner of its service: *Id.*

Before this court can interfere on *certiorari* with a matter confided to the discretion of the court below, it must be clearly shown that there has been an unwarrantable and illegal exercise of such discretion to the substantial injury of the party complaining: *Id.*

Removal of Causes.

Practice—Bill of Exceptions—Plaintiff and Defendant.—In determining a question whether a Circuit Court had erred in denying a motion to remand a case removed to it from the state court, and giving judgment as if the case had been rightly removed to it, this court cannot pay any attention to a certificate of the clerk of such Circuit Court, certifying that on the hearing of the motion in the Circuit Court certain things "appeared," "were proved," or "were admitted," or "agreed to" by the parties respectively; such facts not appearing by bill of exception nor by any case stated. Neither party can gain any advantage by such a statement: *Knapp* v. *Railroad Company*, 20 Wall.

The Act of Congress of March 2d 1867, allowing either of the parties to a suit—they being of a certain class described—to remove it from a state court into the Circuit Court of the United States, does not change the previously existing and settled rules which determine who are to be regarded as the plaintiff and defendant: *Id.*

Hence, where two persons in one state, trustees for bondholders of a mortgage of a railroad owned by a company in another, foreclosed the mortgage, bought in the road in trust for the bondholders, and then

leased it to a citizen of the state to which they themselves belonged, and then a majority of the bondholders in the state where the original company was, in pursuance of a statute there, formed themselves into a new corporation, to which the statute gave ownership and control of the road, and suit was brought in a state court against the lessee of the road by the trustees who had made the lease, *Held*, that the defendant could not remove the suit from the state court to the Federal court on the ground that it was wholly between the new corporation and the lessee, and that the trustees were now merely nominal parties; they, the trustees, not having been been discharged from, or in any way incapacitated from executing their trust, and there having been, in fact, unpaid bondholders who had not joined in the creation of the new corporation, and who had yet a right to call on the trustees to provide for the payment of their bonds: *Id.*

SALE. See *Fraud*

Warranty of Title—Chattel Mortgage—Rescission—Damages.—This was an action on the common counts in *assumpsit*, commenced in a justice's court and brought by appeal to the Circuit, and there tried by jury resulting in a judgment for plaintiff for $150. Plaintiff and defendant traded horses, plaintiff giving his horse and a yearling colt for defendant's horse and $10. Possession was mutually given and the $10 paid. The horse received by plaintiff was afterwards taken from him on a chattel mortgage given prior to the exchange. The main question is whether the plaintiff without rescinding the contract or offering to place the defendant in *statu quo* was entitled to recover under the common count for goods sold and delivered, the value of the horse and colt less the $10. *Held*, 1. That the horse received by plaintiff being at the time of the trade in defendant's possession, a warranty of title on defendant's part was implied in the exchange, as it would be on a sale, and plaintiff might have sued upon that contract, of which the warranty was a part; and that in thus doing he would be affirming instead of rescinding the trade, and would not be bound first to tender back the money received, or to do any other act in disaffirmance of the contract; but such action must be brought upon the express contract; and that no other or different contract can be implied while that is in force and the rights of the parties dependent upon it: *Hurst* v. *Sackett*, 30 or 31 Mich.

Held, 2. That the existence of the chattel-mortgage as an encumbrance on the horse, and the taking of the property under it, would, though the exchange had been executed, authorize the plaintiff to rescind the contract, and by returning the money received he would, it seems, have had a right to sue, either upon the contract, or for goods sold and delivered; but that this is upon the ground that the contract being rescinded there is no express contract existing, and the law will imply one; and that while the original contract remained in force none can be implied: *Id.*

Held, 3. That there was not a total failure of consideration as there was no defect of title to the $10 received; and that the plaintiff is not, therefore, entitled to treat the contract as rescinded while he keeps part of the consideration: *Id.*

Held, 4. That the real nature of the plaintiff's right of action is one for damages for the breach of that portion of the defendant's contract which warranted against a failure of title to the horse: *Id.*

It did not appear that the horse had been sold under the chattel-mortgage, and there was other property covered by and taken upon the mortgage, the value of which was not shown. *Held*, That the evidence fails to show the real amount of the encumbrance on the horse, or the value of the other property taken on the mortgage; that the plaintiff had a right to redeem at any time before he was deprived of possession and even within any reasonable time thereafter; and that the value of the horse and colt traded to defendant could in no event upon such evidence constitute the measure of damages: *Id.*

SHIPPING. See *Navigable Waters.*

SPECIFIC PERFORMANCE. See *Deed.*

STOCK. See *Broker.*

STREET. See *Municipal Corporation.*

SURETY.

When the taking of a Mortgage to secure the Payment of a Promissory Note does not suspend the Remedy on the Note.—The principal in a joint and several promissory note, after the same matured, executed and delivered to the payee therein, a mortgage of real estate to secure the payment of a certain sum of money, the amount of the note being included and referred to as secured by note; the mortgage contained a covenant on the part of the mortgagor to pay the money on a day therein named, but no provision that the right of action on the note should be suspended. *Held*, That the acceptance of the mortgage, which was merely additional or collateral security, did not extinguish or suspend the remedy on the note, and the liability of the surety thereon was not discharged: *Brengle* v. *Bushey*, 40 Md.

Notice to Landlord to terminate Lease.—A lease was for a year, either party might determine the lease at the end of the term by giving a month's previous notice to the other. A surety for the lessee gave due notice to the lessor to collect the rent from the lessee and that he would not be bound beyond the end of the current year, the lessee held over, the surety died before the end of the succeeding year. *Held*, That his estate was not liable for rent during that year: *Pleasonton & Biddle's Appeal*, 75 Pa.

It was inequitable to the surety to continue the tenant for another year after the notice: *Id.*

Though a surety cannot at will discharge himself from his contract, yet equity often relieves a surety when the principal would not be relieved: *Id.*

TAXATION. See *Evidence.*

Exemption.—Intention must be Clear.—To exempt any particular property from taxation the intention must be clear. Bonds issued by the city of Paterson, under a special act (Laws, 1873, p. 24,) to meet an unexpected contingency, not provided for in the charter, and without being exempted by the act, are not exempted by a clause in the charter of 1869, (Laws 1869, p. 768,) in these words: "that the bonds authorized to be issued by the mayor and aldermen shall be issued free and

exempt of and from all city, county and state taxes." That language is fully satisfied by its application to the bonds authorized in the act of which it formed a part: *State, Freese, Pros.*, v. *Woodruff*, 8 Vroom.

TORT. See *Navigable Waters.*

TRUST.

Relief in Equity against voluntary Trust whose purpose has been fulfilled—Husband and Wife.—Husband and wife conveyed her property in trust for her separate use for life so that it should not be liable for her present or any future husband's engagements, and after her death for such persons and uses as she by her will should appoint, and in default of appointment for the persons who would be entitled to her "real and personal estate under the intestate laws of the place where she may be domiciled" at her death. The husband having died, *Held*, that the wife was entitled to a conveyance from the trustee of the trust estate: *Tucker's Appeal*, 75 Pa.

Equity will relieve from a voluntary and self-imposed trust without consideration, when its purpose has been fulfilled and there is no other reason to preserve it: *Id.*

The provision in the deed for succession according to law of the wife's domicil did not vary the cases: *Id.*

WARRANT. See *Practice.*

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